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No. 84-1488

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

BALDWIN-UNITED CORPORATION
and D. H. BALDWIN COMPANY,
Petitioners,

v.

ROBERT M. EUBANKS, III, INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas

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REPLY BRIEF OF PETITIONERS

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Petitioners, Baldwin-United Corporation and D. H. Baldwin Company (collectively "Baldwin"), file this reply brief (1) to ensure that the brief in opposition of respondent, the Arkansas Insurance Commissioner (the "Rehabilitator"), does not create any confusion about the relief Baldwin seeks in this Court, (2) to correct the Rehabilitator's misstatements of certain critical facts, and (3) to advise the Court that its opinion in *Metropolitan Life Insurance Co. v. Ward,* 105 S. Ct. 1676 (1985)—which was decided between the filing of the petition for a writ of certiorari and the brief in opposition in this case—is controlling on the merits.

At stake is the ability of the debtor in perhaps the most complex bankruptcy case ever filed to challenge a state court injunction that prohibits it and the bank-

ruptcy court from acting on core claims. This petition must be distinguished from the vast number of others seeking this Court's review. Baldwin is not simply saying, as a well-known reporter once exclaimed: "The death of any human being is terrible, . . . but the most terrible is the death of a human being I am covering." THE NEW REPUBLIC (Dec. 6, 1982). The threat to Baldwin and the authority of the bankruptcy court in this case is real and presents federal interests of the highest order.

1. Baldwin requests that this Court grant the Petition for a Writ of Certiorari [1] and vacate the judgment of the court below or, in the alternative, grant the Joint Motion to Defer Consideration of the Petition for a Writ of Certiorari ("Joint Motion"), both on the grounds that this action is moot.

As recently as March 21, 1985, the Rehabilitator unequivocally stated that this case is moot in papers filed in this Court.[2] Offering no *new* facts to justify revising his earlier declaration, he now urges for the sake of opposing the petition that the case is not "necessarily" moot.[3] *See* Br. Opp. at 4. The Rehabilitator does not, however, assert the one fact that would render this case live: he does not state that he intends to pursue his claims against Baldwin so that Baldwin must reactivate its counterclaims to the same assets.

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[1] Cited as "Pet."

[2] "There being no current live controversy between the parties, the litigation that gives rise to the petition in this case and the dispute between the parties over the injunction entered in that litigation are moot." Joint Motion at 2.

[3] Alternatively, the Rehabilitator suggests that the issues presented are of such public importance that the case should not be treated as moot. Brief in Opposition ("Br. Opp.") at 9-10. Such treatment is only accorded when the issue would evade review if it arose again. *See DeFunis v. Odegaard*, 416 U.S. 312, 318-19 (1974) (per curiam). The Rehabilitator cannot meet this additional requirement.

While Baldwin remains willing to abide by the Joint Motion, if the Court should decide not to grant the Joint Motion because of the Rehabilitator's inconsistent positions, Baldwin urges that the writ be granted and the judgment below vacated, in accordance with the sound precedent of this Court cited in its petition. Pet. at 11-12.

2. If the Court concludes that the case is not moot and that it therefore has jurisdiction to rule on the merits of the decision below, Baldwin requests that the writ be granted and the judgment of the Arkansas Supreme Court be reversed, summarily or after full briefing and argument on the merits.

a) The Rehabilitator confesses that, at bottom, he opposes vacating or reversing the decision below in order to preserve the "stare decisis" effect it may have in later litigation with parties not presently before this Court. Br. Opp. at 10. *See also* Joint Motion at 3. However, in a recent decision this Court rejected the legal premise on which the Arkansas Supreme Court opinion was based. As a result, the opinion does not deserve to control this case or future cases.

In *Metropolitan Life Insurance Co. v. Ward*, 105 S. Ct. 1676, 1683 (1985), this Court held that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), only limits the scope of legislation enacted pursuant to the Commerce Clause. *See also Western & Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 648, 653, 656 (1981). It does not limit the applicability of other constitutional provisions or legislation enacted under the authority of other constitutional provisions. *See id.*; *Ward*, 105 S. Ct. at 1683. Baldwin argued in its petition that for this reason the Arkansas Supreme Court erred in upholding the injunction in reliance on the McCarran-Ferguson Act. Pet. at 22-24. *Cf.* Br. Opp. at 5, 11-13. This Court's subsequent opinion in *Ward* vindicates Baldwin's position that the McCarran-Ferguson Act does not limit a Con-

gressional grant of jurisdiction pursuant to the Bankruptcy Clause.[4]

b) The Rehabilitator urges that reversal would be meaningless because of the supposititious "res adjudicata [sic] . . . effect" in the bankruptcy court of a nonexistent state court determination of claims to the assets at issue. Br. Opp. at 6. The claims to the assets underlying this jurisdictional dispute have not been filed in or decided by the state court. They have been filed in the bankruptcy court—nowhere else. *See* Pet. at 6-7. The Rehabilitator's repeated assertion to the contrary (without citation) is startling. See Br. Opp. at 3, 4, 6-7, 15. It simply is not true that the March 23, 1984 Order Adopting the Plan of Rehabilitation ("Order") decided these claims. Indeed, the Arkansas Supreme Court found "the record . . . silent as to the size or exact nature of [Baldwin's] claims." (App. A, 5a.)

More importantly, on March 16, 1984, the state court approved a February 2, 1984 Agreement between the parties that set aside the claims and assets at issue here from treatment under the Plan of Rehabilitation, requiring that these assets be held separately "until such time as a final non-appealable order of a court of competent jurisdiction shall have determined what party(s) is entitled to such Affiliate Securities or their proceeds." Agreement at 3. No claims were to be brought for 90 days, *id.* at 2, and this period did not expire until well after entry of the state court's post-hearing Order. Thus, the Rehabilitator specifically requested and the state court ruled that no disposition was to be made with respect to the claims and assets in question until the claims were

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[4] The state court also erroneously looked to the exclusion of insurance companies from the definition of eligible debtors in the Bankruptcy Code, 11 U.S.C. § 109 (b) and (d) (1982), to bolster its position. (*See* App. A, 8a.) The Bankruptcy Code does not provide "[a]dditional support," Br. Opp. at 5, for the McCarran-Ferguson Act argument. *See* Pet. at 21-22.

finally decided. In fact, the Agreement specifically leaves open which court is to make that determination.[5] The Rehabilitator's assertion that claims to these assets were determined by the state court Order is not credible and is disingenuous.

Further, the terms of the Order itself refute the Rehabilitator's contention. The injunction was not issued to preclude relitigation of the question of ownership of property that had conclusively been determined to belong to the insurance companies. The state court concluded only that, for purposes of administration, all assets in the physical possession of the insurance companies at the time of their rehabilitation, including the assets that are the subject of this dispute, should remain under the control of the Rehabilitator pending a resolution of claims against them. The injunction was intended to bolster the state court's conclusion that it had "exclusive jurisdiction . . . to determine the validity or invalidity of all claims against such assets." (App. B, 12a.)

c) The state court's assertion of *in rem* jurisdiction over the disputed assets will not be affected by reversal of the court below. Baldwin seeks simply to litigate *in personam* claims to those assets in the bankruptcy court. *See* Pet. at 19-21. Baldwin does not object to returning to the state court for assignment of priority to collect on the judgment if its claims are favorably adjudicated in the bankruptcy court. *See Old Security Life Insurance Co. v. Continental Illinois National Bank*, 740 F.2d 1384 (7th Cir. 1984).[6]

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[5] Baldwin has never consented to an application of the injunction that would interfere with disposition of these claims in the bankruptcy court. The Rehabilitator's representation to the contrary, Br. Opp. at 2 n.2, presumably refers to the fact that prior to filing for bankruptcy Baldwin consented to the rehabilitation of its subsidiaries. The legal grounds for Baldwin's objection to application of the injunction did not arise until after it entered bankruptcy.

[6] The Rehabilitator's argument that vacating or reversing the court below may threaten the Plan of Rehabilitation strains credi-

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, when the Court acts on the petition, the writ should issue and the judgment and opinion of the Arkansas Supreme Court should be vacated, summarily reversed or reviewed.

Respectfully submitted,

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bility. These claims and assets have been set aside from treatment under the Plan pursuant to the February 2, 1984 Agreement.

Nor would vacating or reversing the court below on the questions presented here result in a multiplicity of suits undermining state insurance rehabilitation. The validity of the Plan of Rehabilitation and operation of its broad injunctive language against others not in bankruptcy would not be affected, any more than, for example, a successful challenge to application of a park permit ordinance to certain religious meetings would necessarily strike the ordinance from the books. *Cf. Poulos v. New Hampshire*, 345 U.S. 395 (1953).

There is a much more palpable threat to the bankruptcy proceedings from the injunction. Not only will the bankruptcy court lose control over the insurance company claims, but it will lose the ability to decide the merits of related claims including, for example, an additional hundreds of millions of dollars of claims filed in the bankruptcy court by state Insurance Guaranty Funds who argue that they claim through the insurance companies.